EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

APPLE INC.,
Plaintiff,
vs.
MASIMO CORP, et al.,
Defendant.

Case No.
22-1377-MN-JLH
22-1378-MN-JLH

TRANSCRIPT OF DISCOVERY CONFERENCE

DISCOVERY CONFERENCE had before the Honorable Jennifer L. Hall, U.S.M.J., in Courtroom 2B on the 3rd of August, 2023.

APPEARANCES

POTTER ANDERSON & CORROON LLP
BY: DAVID MOORE, ESQ.

-and-

WILMER CUTLER PICKERING HALE AND DORR LLP
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(Appearances continued.)

PHILLIPS MCLAUGHLIN & HALL P.A.
BY: MEGAN HANEY, ESQ.

-and-

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BY: STEPHEN LARSON, ESQ.

Counsel for Defendant

THE COURT: All right. So we're here for some discovery disputes. Why don't we have folks make their appearances for the record

MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of Apple. I'm joined by co-counsel from Wilmer Hale Jennifer Milici, Mark Ford, and Lydia Turnage. Also joined by Jeff Seddon and Ben Luehrs from Desmarais, and also Natalie Pous and Jack Pararas from Apple.

THE COURT: Hi. Good morning, everybody.

They've got you out numbered today.

MS. HANEY: Yes, Your Honor. Good morning. Megan Haney from Phillips, McLaughlin, and Hall, and I'm joined today by Steve Larson from Knobbe.

THE COURT: Good morning.

Well, I've got a giant stack of discovery disputes in front of me. I can tell you we've looked them over closely. One thing I will say is this: You probably have a better recollection of everything that's happened in this courtroom than I do because I know, and I can tell the way this case has been going, you

guys have been spending a lot of time on it. I've got to tell you I've got hundreds of other cases. You may have to remind me of allegations and things that happened. We had a lot going on in the courthouse this month, as you all know.

So let's start with the dispute that I read first, which is Apple's first dispute, and it talks about Masimo allegedly withholding evidence related to antitrust.

MR. FORD: Good morning, Your Honor. Mark Ford. I've been here a few times. First time I get to talk, which is nice.

So, Your Honor, this is the first of two disputes that Apple brings. It relates to the Walker Process damages. And, frankly, this is about whether Apple gets any meaningful discovery at all into what may be the only claim of damages Masimo brings.

Imagine a plaintiff saying you cost me tens of millions of dollar because I had to hire a contractor, but I'm not going to give you the details and underlying invoices for what I paid for that would allow you to test that or substantiate whether what I'm paying

for is something it cost. No litigant would ever be allowed to do that. That's what Masimo wants to do here times three, because they're seeking treble damages. They want to say to
10:09AM Apple, "I want to tell you what my lawyers calculated as the portion of litigation fees which are entitled to treble damages, and you will have no ability to test that in front of a jury."

10:09AM The DC Circuit decision in *Ideal Electric* confronts this entirely. It's the leading case that's cited in our papers. It says when a party claims litigation costs as damages, as Masimo does here, the underlying invoices are
10:09AM business records that are discoverable just like any business record underlying any damages claim, and the privilege gives way to the defendant's right to claim privilege.

So there are a few types of requests
10:09AM here. I'm going to start with the part of our motion that seeks underlying time entry detail. If you remember from your time in private practice --

THE COURT: Absolutely. And I want
10:09AM to give you a chance to say what you want to

say. Let me tell you what I'm thinking here. I get your point. Understood. You need to have more information to test the fact that these attorneys fees were incurred working on
10:10AM the patents that are accused of Walker Process.

On the other hand, I know what they're going to say, which is, they're not going to be turning over to you in realtime everything they've been doing every month on all of the
10:10AM litigation. How are we going to solve this? Because I would never order that.

MR. FORD: I think that makes sense. I'll cut right to the chase, which is, it sounds like you understand the relevance of it.
10:10AM THE COURT: I absolutely do. You need to be able test whether the fees they're saying were incurred were, in fact, incurred working on particular patents. You don't need to know exactly the details about what they
10:10AM were doing on those particular patents. You don't; right? If you can have some way to test it --

MR. FORD: So first thing I'll say
10:11AM is, I actually don't think the privilege or sensitivity gets in the way of fundamental

fairness.

The first point I'll make, which is the fundamental part is, Masimo put these records at issue by saying essentially saying these are
10:11AM the amounts my lawyers claim are associated with these patents. By doing that, you can't then say, "I'm not going to allow you discovery about into what my lawyers said these patents are about." That's classic at-issue subject
10:11AM matter waiver. It would be like a litigant saying, "I don't willfully infringe because my lawyer said I didn't infringe. Here's a one-line e-mail that says you don't infringe, but I'm not going to produce the ten-page
10:11AM memo."

I think, candidly, although there's a waiver, and that's, I think, pretty clear, I think there's really not much that truly privileged. For example, the fact that
10:11AM Mr. Larson is here arguing the motion to dismiss, that fact is not privileged. He goes back tonight and writes on time entry, "Argue motion to dismiss, 1.2 hours." It doesn't become privileged. There's not any actionable
10:12AM sort of intelligence, but it does allow us to

test the claim. There's, frankly, no other way for us to guard against overstatement. If I could have a moment at the end --

THE COURT: At the end of the day, isn't it always going to be true in any case for those attorney fees? Normally, you have a billing record, and all of the billing records is what is sought as damages. And, you know, maybe there's other types of cases where you're
10:12AM seeking attorney fees and you're arguing whether or not that's reasonable. That may not be the case, but the fact that they were incurred --

MR. FORD: This is about allocation.
10:12AM It's not only that it's occurred. We need to know whether -- you can't have just Masimo decide whether it's properly allocated to treble damages or not. They're only allowed treble damages for a small piece. Without
10:12AM knowing that this is drafting an interrogatory response concerning the XYZ patent, we don't know whether they're improperly allocating.

What I would suggest as a path forward -- because I understand what you're saying. As a
10:12AM litigator, it's not like I really appreciate,

one, we don't need it realtime. It can trail by a couple months if that helps.

Two, the vast majority of these entries really don't reveal client confidence and really don't reveal a strategy. The fact that I worked on the motion to compel isn't going to give them much advantage. To the extent there's anything in these time entries that truly does reveal a client confidence or an undisclosed, strategy, it seems like Masimo has a decision, that any company has to make. Either, one, produce it and claim damages or, two, redact it and don't claim damages.

What it seems like they can't do is have their cake and eat it too. There's a fundamental fairness in any damages claim. Your Honor, it's critically important not only to whether -- the exact calculation of this damage is really important in this case because I believe the incremental costs are going to be quite small if they're properly allocated. At best, seven claims of the ten. They can't recover for the cost they would have incurred anyway for the other three. But they may only prove that one of these patents was

fraudulently cured. Maybe the incremental costs they incurred that they wouldn't otherwise have to incur in defending is quite small. That's significant to present to a jury; right? Because it undermines the theme. It undermines the theme, Your Honor, that by bringing this claim it was predatory tactic.

THE COURT: I get it. I get it. I get it. I think maybe what we need -- and we'll hear from the other side -- is a better understanding of what they're reporting on that billing code and maybe we can work out something where you get information about the total amount incurred and what percentage this is about. I don't want to have a situation where I'm looking at billing records, but if you're saying this evidence is critically important, I guess that's the type of thing we could do. I'm not quite sure it's necessary. Let's hear from the other side how they're billing this code and see if we can figure out a path forward.

Do you understand what I'm asking?

MR. LARSON: I do, Your Honor. Thank you. Steve Larson for defendant and

counterclaimant Masimo.

As for the question of how we're willing to do the code, the attorneys have been instructed -- and I don't want to reveal anything internally about communications -- but if the work pertains to the fraudulently obtained patents, there's a special code for that the attorneys are supposed to use. If the work pertains, for example, the antitrust case, for example, what I'm doing, that's a different code. That's not a matter of damages for the jury. After the fact we're going to seek attorney's fees, but that's not going to be part of the damages claim. That's not because of the fraudulent patents. That's just from litigating the antitrust allegations.

THE COURT: What happens if the work pertains to litigation generally? Where does that get billed? Does that get allocated?

MR. LARSON: If it's work that we believe we would have done because of the fraudulent patents, then it should be billed in the fraudulent patent code. We could also -- if there's questions about this sort of allocation, we've given them an option. We've

given them a path forward on a golden platter. They say the costs aren't that high, so I don't see a reason for burdensome discovery for something that's not going to be that great magnitude.

What we've offered to them is we're going to provide invoices, monthly invoices, with the totals actually paid by Masimo that are attributed to specifically to the fraudulent patents.

THE COURT: Are you telling what goes to the other patents too? Shouldn't they be able to know what percentage is being spent on these patents so they can eyeball it or test it to make sure it sounds reasonable?

MR. LARSON: Right. What we said is, in terms of total cost, if the question is, are these costs harming our ability to compete, we can give them total costs, and they can compare that if they want to have total litigation costs, that sort of information. These fees don't answer that, but we can provide that.

We can go to the jury with these monthly invoices that have the total amounts. It was the exact discovery provided in the *Garden* case

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that Judge Burke was sufficient, that it was proper for the expert to rely on --

THE COURT: Is there any objection if I allocate between recoverable costs --

10:17AM MR. LARSON: Not all the patents were accused of fraud in that case.

Yes, in that case, there was an issue of not all the patents being accused of fraud. In that case, Judge Burke noted that he didn't see a reason for the expert to have to go through all the detailed hourly entries. That's really the issue. We provide them invoices, provide the total amounts. When you go into these specific hourly entries, that's very problematic and potentially prejudicial, for us to give them realtime updates on what we're doing.

THE COURT: They say they don't want that anymore. That's off the table. Realtime updates are off the table.

MR. LARSON: They said they might want it a few months after the fact. The question I have is where all this is going. Are we going to have attorneys being deposed? Are we going to have attorneys on the stand?

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Are we going to have a sort of minitrial on the reasonableness of fees, which I think they raise and argue? They're going to question whether our fees are reasonable.

First of all, I don't think there is a reasonableness requirement for damages, and that's in the Judge Burke case we cited. That's also a case we cited from Wisconsin, that there's not a reasonable aspect. If we're going to into the reasonableness of fees, I think it's fair that we're going to want to have assessment of their fees as well so the jury can see what's reasonable. If we're going to be questioned about one attorney coming to a Delaware hearing, I should be able to point out --

THE COURT: I'm not seeing a world where we're discussing the reasonableness of fees. I am seeing a world where they say you're claiming that you spent -- whatever number I throw out is going to show my lack of understanding about how much this case costs. They're going to say you guys want $5 million in fees for litigating these patents, and you're going to spend that money anyway, even

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if you didn't assert these patents. That's what they want to say, so how are we going to get them the information so they can say that?

MR. LARSON: That's the solution we provided to them, which is if this is really worried about the number being high with some sort of audit taking place with regard to the particular entries, what we've offered them is, we'll go to the jury trial. You'll have your jury trial with the amounts that we have. And after trial, we can have an audit with a special master or some other proceeding with the Court, to go through the entries where the damages award can only be reduced because maybe there's an allocation error along the way.

This is really about a concern about the damages being too high. I think that's an excellent solution. I'm not sure why they wouldn't accept that. I think that -- it's also an issue of, well, we want a sense of all the fees you're spending, for example, on all the patents, some total number. That's something we could work out. That's not something they offered before, but we could provide that if that's the question.

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Our real concern is these particular requests are very broad and burdensome and we don't want to provide hourly entries in realtime. Most of Apple's case, it's really after the fact entirely when anything was provided.

I want to make a couple more points that I think the default here is we do believe these billing fees, hourly fees, are privileged. We cited Third Circuit case. We cited a District Court case from the Third Circuit on this. *Montgomery* was a Third Circuit case. *Lane vs. State Farm* was a District Court case from Pennsylvania. Apple cites a treatise and a couple cases from outside the Third Circuit, but we think if you look at the caselaw we cited, the default is yes, these billing entries are privileged, and they're very sensitive.

We think it would be very prejudicial, and I don't know where Apple is going in terms of having a trial -- if they want to have a trial in front of the jury about these attorneys and how they bill their time. I don't think that's something we want to do.

Those are the solutions we have in mind. We've offered, at least, the idea of a post-trial sort of check or audit of the fees. We'd be open to the possibility of giving them 10:21AM a total amount on the other patents so they can compare that. That's a possibility. I'm open to other solutions.

Seems to me there's points I want to make.

10:21AM The other thing about -- I do maintain that these requests in particular are very burdensome and broad and, for example, seek very detailed discovery as to all the patents at issue, all the consultants, whether we're 10:21AM seeking a fee or not, so I want to make sure that's out there.

THE COURT: Have a seat.

Why don't you tell me what is the particular problem with them going to a jury 10:21AM with the total amount that they claim -- and you've got the opportunity to say to the jury that's too high, but if the jury ultimately awards their number and they've agreed the number can only be reduced at that point by the 10:22AM Court after, is that a Seventh Amendment

problem?

MR. FORD: It's a Seventh Amendment problem because we have a Seventh Amendment right to have the jury decide the amount of 10:22AM damages, and they would be --

THE COURT: That's what I said, but they would be deciding it and then it would only get reduced. It would only be in your favor afterward.

10:22AM MR. FORD: The fact that we don't get to truly test in front of the jury the amount of damages -- so they're presenting the situation where we would essentially get a black box in front of the jury and not be able 10:22AM to really get into their allocation, and the jury would assume the damages are more. And that has a significant effect, Your Honor, because there are secondary effects to these costs.

10:22AM They're arguing that these costs impair our ability to compete, we've lost sales, we didn't invest. So the jury needs to really understand what those costs actually were to make that true assessment of whether there was 10:22AM any harm to competition, number one.

And, number two, I want to get to the fee agreements. It's conceivable that the underlying fee agreement might show that there's no incremental costs at all. There 10:23AM might be a fixed fee agreement in place where if they prevail on only one patent, they would have incurred the same amount of fixed fee even if there were nine patents-in-suit. The result, if we're able to prove that, is they 10:23AM have no injury at all. They have no standing. The claim fails.

I think this goes to the liability. It goes to the jury's understanding of the magnitude and effect. Respectfully, I don't 10:23AM think Apple can be put in a position to choose between the Seventh Amendment and the reasonable discovery. I will say this, though: He pointed to two cases the *Garden* case --

THE COURT: I read them. I'm good. 10:23AM I'm ready to talk about this. We've had a lot of cases with a lot of sound-bites. I get it.

Here's what we're going to do: I don't think my thinking on this has changed after talking to everybody today. We all know the 10:23AM situation we're in, is that it would be great

for your side to get all the billing records to see what they're up to. That's not going to happen. On the other hand, you get more than just a number. We need to figure out what the 10:24AM balance is going to be here.

It's not enough -- you've got to give them more than just saying here's the numbers for this billing code and it's too much to turn over all the invoices.

10:24AM So at a minimum, what I think we need is information from Masimo provided to Apple that has to do with what the fee arrangements generally are, and that can be provided in the form of the documents or a declaration with 10:24AM attached documents, but they need to understand under oath how these fees are being charged, to and include how decisions are being made to put stuff on this billing code. I also don't think it's unreasonable for them to have an 10:24AM understanding about what percentage of the total litigation costs the billing codes amount to.

And then if there are any further disputes about the details and how this is 10:25AM going to go forward, I'm not saying that I'm

not going to review billing records, and I'm not saying that billing records don't have to get produced at this point. But I hope you all, with that guidance, can work out the rest of this because you know what you need.

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I don't expect -- as I'm thinking how this trial is going proceed, the biggest issue of the day is going to be whether it should have been $4 million for billing on these patents or five or whatever it is. So I'm taking that into account, but also I don't have a sense of how much money we're talking about here. If there are further disputes about this, each side needs to come up with the most reasonable proposal for getting the other side what they need, and I'll just pick one. And so that's an incentive to be reasonable about it.

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So just to be clear for the record, the ruling on this, which is pursuant to Federal Rule of Civil Procedure 26, this is a discovery ruling about what needs to get produced that's proportional to the needs of the case, taking into account burden.

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Anything else?

This paragraph on page three where Apple

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states budgets and forecasts for those fees and costs, that whole second paragraph of requests is denied.

All right. So let's go to Issue 2. Documents on factors impacting forecasts and proper billing. So you're getting forecasts and projections, but you want something else, but they say, "What do you want us to look for?" Is this dispute concrete?

10:26AM

MR. FORD: I'm hoping to clarify it. We tried during meet-and-confers, and there may be some developments that help me to clarify. They agreed to provide forecasts for the sale of the watch, the W1, maybe the Freedom as well. What we want is internal Masimo analysis about what's driving the forecast. What's driving demand? What factors are impacting demand?

10:27AM

And it goes to damages, Your Honor. In this case, across a number of claims, Masimo is, essentially, blaming Apple for underperformance in the marketplace. Blaming false advertising, blaming the alleged patent infringement, blaming the litigation costs. It's saying that it's hurting our sales. We're

10:27AM

losing sales.

If internally, Masimo's pointing to other market factors, just supply factors at the manufacturer, that's obviously relevant. We just don't want to see an expert to look at a forecast going down and blame Apple if internally what Masimo is saying is pointing to something else.

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During the meet-and-confers, we tried to explain this to Masimo to get them to understand what we meant by "factors." I think what might clarify is the recent press release by Masimo. I'm happy to show this to you. It's very recent. It's from July 17th. Basically, what happens, Masimo adjusted its guidance and forecasts and said the reason why our healthcare revenue is down relates to a number of factors: Orders were delayed, inpatient census went down, there were labor shortages at hospitals, our OEM partners were unable to provide patient monitoring. This is precisely the type of thing that pertains to the W1 and forecasts that's common in any case. This is why we're not doing well in the marketplace.

10:28AM

10:28AM

THE COURT: Now, they say they asked you for search terms, that they'll run them for you. Did you do search terms?

MR. FORD: We have provided search terms. I think my concern is they're not necessarily agreeing to produce the responsive documents that hit on the search terms. So we provided search terms that, one, for purposes of e-mail collection, should, we hope, identify the documents. But then I just think we need them to acknowledge they'll produce more than just the forecasts and also produce the analysis underlying the forecast.

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THE COURT: I think that's in their letter. Let's hear from them and we'll see if there's --

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MR. FORD: And the second part is I just think this is something that you would have to do search beyond e-mail. They're essential files about forecasts and business plans. I would expect you can ask the company, the leadership of the group, where is the analysis that goes into forecasts? Even if it's not in certain e-mails, that's something that, as a general matter, both sides are doing

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that essential file collection to make sure we have the key documents.

Thank you, Your Honor.

THE COURT: All right. Thank you.

10:29AM MR. LARSON: First of all, I want to make clear that it's not our goal to run these search terms and not produce the documents that would result from the search terms. We saw that as a potential solution because the 10:29AM problem with our can request is every time we ask them to sort of explain what factors may potentially impact actual or forecasted information, we get lots of different examples of different types of documents. We want to 10:30AM make we fulfill our discovery obligations. It's very difficult, even from the last example, there was a long list of different types of documents.

THE COURT: But I kind of understood 10:30AM with that example, like, sort of what they're after. They issued a press release that says here's why we think our forecasts are the way they are. Can you talk to the folks and see --

10:30AM MR. LARSON: I need to get a copy of the press release. I haven't seen this before.

This is brand new, but it wouldn't surprise me that Masimo would identify various factors. I don't know if that's all the factors. It sounds like a lot of different types of 10:30AM categories of documents. That's why we think a search term approach makes sense for this document request. Maybe a document sufficient to show factors that impact would be okay because then we could ask Masimo executives, 10:30AM hey, what do you think? What types of document would show this?

THE COURT: It's hard for me, because I don't know what the answer is. Based on what you're hearing today and based on what I'm 10:31AM hearing from you today, you're not saying you're not going to produce those types of documents.

MR. LARSON: No. I mean, our issue is not we're going to produce those types of 10:31AM documents. We're going to produce financial forecasts. We're going to run their search terms. We'll produce the results of the search terms. When we agree to produce documents responsive to a request, we want to make sure 10:31AM we know what we're supposed to do and what

documents are being sought. That's the issue with this request.

THE COURT: What do you need to know from him sitting here today?

10:31AM MR. LARSON: I guess if we had a clear list of the different factors.

THE COURT: They don't know what the factors are. They're trying to find out what the factors are.

10:31AM MR. FORD: I might be able to simplify. I think -- maybe this is my failure during the meet-and-confer. I'm not asking Mr. Larson, as an economist, to figure out all the potential factors and create all documents, 10:31AM all labor shortages, things like that. I'm asking to look at what your executives are saying are the reason why the forecasts are changing. Start with that. Start with documents and analysis about the forecast or 10:32AM outlook.

THE COURT: I don't know how these documents are kept. They might be able to look for them?

MR. FORD: I think there are probably 10:32AM e-mails between executives where they're

working on the forecast and they're talking back and forth about why we should move the forecast up or down. I can't guess all the factors. I'm not a businessperson. I don't 10:32AM think he needs to start with the factors. I think you start with what's the work that goes into the forecast, and if those documents are showing Masimo business people point to other reasons for underperforming, the document is 10:32AM responsive. I can't come up with an exhaustive list of all the reasons the product is underperforming because I'm not the businessperson.

THE COURT: I know. Generally, the 10:32AM way this is done is people search with search terms.

MR. FORD: So we provided search terms like forecast, budget, all that stuff. You look at an e-mail, and it will be talking 10:32AM about the budget, and we're going to lower the forecast because our suppliers are delayed.

THE COURT: I'm not hearing from them they're going to withhold them. Have a seat and let them respond.

10:33AM Do you think we might benefit from

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additional meet-and-confer on this issue?
MR. LARSON: Potentially. We're having a meet-and-confer about the search terms, of course, in general about the burden and how many hits they are. I think a document sufficient to show would make us more comfortable. We could talk to the executives, try figure out what the factors are and provide some category of documents. Our only concern is to make sure we agree to produce all documents, that we know what we're searching for and looking for.
THE COURT: Why don't you meet-and-confer on that. I'm not going to say documents sufficient to show is enough at this point, because I have no idea what exists, and sounds like you don't either.
So they're not refusing to produce those. Those are going to move forward in the ordinary course, and you all are going to meet about burden, and that's subjects to any future rulings under Rule 26.
So I think that's the first set of disputes, so let's move on.
So now we've got Masimo's disputes. So

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let me get those pulled up. These are the disputes, also, about the antitrust counterclaims. Let's take these one by one.
Go ahead, Counsel.
MR. LARSON: Thank you, Your Honor.
So I'll begin with the first section of our letter, and this is where we're requesting the Court's assistance, just to begin with, before we get into particular document requests, and we want clarity that there's no general embargo on predatory infringement discovery or IOS discovery. The reason this is important is Apple says they're not going to answer 'rogs, they're not going to supplement their initial disclosures, they're not going to provide pretrial disclosures. They've asked us to not provide expert discovery on this and have expert reports on this.
And really, the argument has to do with discovery-type arguments. They're really about the Court's report and recommendation, and we don't view the Court's report and recommendation as saying that it was going to blatantly embargo discovery on those issues. We read it as saying the Court will consider

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individual requests as they came up.
So there's been a lot of --
THE COURT: Let's talk about the predatory infringement request for production. It was very helpful that you attached as Exhibit 1 a summary of what's going on here.
So which ones are the predatory infringement?
MR. LARSON: Predatory infringement is the next section of the letter. That's 83 to 84 and 86 to 90.
THE COURT: 83 talks about all documents and communications referencing, relating to, or discussing the practice of efficient infringement for the practice of infringing and appropriating intellectual property even after being informed of such conduct because it is more advantageous to do so that to pay for lawful use or draw up the intellectual property.
That request is going to be denied as not proportional to the needs of the case.
What's the next one?
MR. LARSON: That's 83, Your Honor.
THE COURT: Yes.

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MR. LARSON: The next one is 84.
THE COURT: 84. All communications with third parties related to allegations that Apple unlawfully acquired or used intellectual property. Merit two responsive documents regarding -- this sounds like a trade secrets dispute that you had with them; right? Is this something different?
MR. LARSON: This is something different. I think what's important here, the point I wanted to make on some of these requests, and for a number of these requests, is we saw Apple argue in its motion to dismiss, and we're going to see Apple argue again on the motion for summary judgment, say, "Masimo, you've only shown harm to yourself. You haven't shown harm to competition." So Apple is saying, "We'll provide these documents as to you, Masimo, but we're not going to provide discovery as to this practice as regards other parties," which is what we need to show or want to show harm to competition.
So I think just for a little bit of perspective here, we did take Your Honor's ruling into account, and I think Apple has

seasoned counsel that I think can confirm that the discovery we're seeking here is really a drop in the bucket to what you typically have in big antitrust cases. It's very expensive and burdensome discovery.

THE COURT: I understand.

MR. LARSON: It's really focused on the facts of what actually occurred, is what we're seeking with these requests. And I'm hoping this will be our main, only discovery dispute about antitrust discovery. These are the requests that we brought to the Court that we feel we need to be able to develop that part of the case.

10:38AM THE COURT: Okay. 84 is also denied. What's the next one?

MR. LARSON: 86.

THE COURT: 86. Denied.

MR. LARSON: Can I ask for

10:38AM clarification on that?

THE COURT: That's denied pursuant to Rule 26. It's not proportional to the needs of the case.

MR. LARSON: That answered my

10:38AM question. So it's not a blanket embargo for

predatory infringement discovery?

THE COURT: These particular requests are denied.

MR. LARSON: Thank you, Your Honor.

10:38AM Next one is 87.

THE COURT: Denied.

MR. LARSON: Next one is 88.

THE COURT: Denied.

MR. LARSON: 89. And can I offer a

10:39AM little bit of argument on this one.

THE COURT: That's fine.

MR. LARSON: Again, you see here, we're referring to specific parties, and these are parties that I mentioned in our complaint

10:39AM that we believe Apple engaged in the practice of predatory infringement with regarding these parties. And again, Apple is going to argue we're only showing harm in competition to ourselves and not these other parties. This is

10:39AM the the type of discovery that we would seek to be able that establish that. I don't see arguments about burden or proportionality. It's really just about relevance, and what Apple argues about these parties is these parties aren't in the relevant market. To the

extent that's true, we believe it's because of the conduct that Apple engaged in.

THE COURT: I understand the argument, but that one is also denied. I

10:39AM appreciate your argument.

MR. LARSON: Understood.

Next one is 90.

THE COURT: Denied.

MR. LARSON: And next one is -- I

10:40AM believe that's --

THE COURT: Predatory infringement.

MR. LARSON: Predatory infringement.

THE COURT: Okay. Monopoly leveraging.

10:40AM So I'm confused about 62. I'll be honest with you. It's about -- I thought the market you wanted was the market for IOS app distribution. Am I a moron? Isn't that a high percent? Don't they have a monopoly on that

10:40AM market? Is there something I'm not getting? What am I missing out on?

MR. LARSON: What they're going to argue is that's not about the market. They're going to say that it should be a broader

10:41AM market, and this really goes to the ecosystem

request, so I'll go back on that. That's request 112 and 114.

This set of requests have to do with Apple's conduct in that market, and so

10:41AM request -- the question of whether that is a market, 112 and 114, we'll get to that in a second unless you want to go ahead and address that. These are less about what that market is and more about the conduct in that market,

10:41AM showing that Apple has monopoly power in the market. And Apple hasn't conceded that. If Apple were to say that's not an issue here, that would be fine, but barring that, it's something that we need to pursue.

10:41AM THE COURT: Okay. All right. So what is it -- give me the type of idea of the type of thing you're looking for in -- you want to talk about 112 first? We can talk about 112 first.

10:41AM So 112 has to do with documents and things referring to Apple Watch and Apple's ecosystem with interconnected products, and they don't what to produce that. No, they're happy to produce that. They just don't want to

10:42AM talk about stuff that doesn't have to do with

the watch, so whatever the hot now product is, they don't want to give you documents on that.

MR. LARSON: The issue is not that -- we would be happy if the ecosystem documents are limited to documents that also talk about the watch.

THE COURT: Is there a dispute on that then?

MR. FORD: We're happy to produce documents related to the ecosystem as it pertains to the watch business. It's just the stuff that's totally unrelated to the watch.

THE COURT: We're okay on that?

MR. LARSON: The issue is they said what they produced is not what we're seeking at all with these requests. Literally, what they say is documents showing how the ecosystem increases demand for the Apple Watch, which is not what we're trying to show here. Here, we're trying to show that there's a discrete market for the IOS apps, and the way you do that under caselaw show that a particular market or submarket, you show it's very sticky. You show that once a customer makes a decision, for example, to go with Apple, now it's in

Apple's ecosystem. It's going to be stuck there, and that's under the *Kodak* case --

THE COURT: Give me -- paint a picture in my mind about what type of document you're looking for. Give me an example.

MR. LARSON: These are documents that talk about how difficult it is, for example, for a customer to leave Apple's ecosystem. In the context of the Apple Watch, it's fine. In fact, we have search terms on that. We'd be happy to rely on our search terms on that, but we want to make sure when they provide documents, they're going to provide all the documents and not limit it to documents that show how Apple's ecosystem increases the demand for Apple Watch, which is what they said they would provide.

THE COURT: Do you understand what he's talking about?

MR. FORD: Yeah, I think he's interpreting our statement too narrowly. I think what he's talking about is demand. We've also agreed to produce documents related to the willingness or ability of Apple Watch users to switch to other products.

THE COURT: Is everything --

MR. FORD: Everything he's describing there, we're willing to produce.

MR. LARSON: I'm not sure. When he says I think that is about demand, maybe we're two ships passing in the night. If they say they'll run the search, they'll produce the documents from the search, subject to the parties' negotiations about burden and there being too many hits, then I think we're okay on that one.

THE COURT: Okay. Great. We're making progress. That's 112 and 113 and that 114 kind of seems the same too; is that right?

MR. FORD: That's my assessment.

MR. LARSON: Those are all related. Same issue.

THE COURT: So those are good. Let's go back, now, to 62 and 63. Is that kind of the same thing?

MR. LARSON: These have to do with market definition and market power and distribution markets and in particular -- if you give me one moment.

THE COURT: Take your time.

MR. LARSON: So I mean, I think we see this as a pretty narrow request. These are literally Apple documents talking about market definition where Apple itself is saying, hey, here's what the market is. We think those documents would be very relevant to disputes, if any, about what the market is. I think there's going to be a dispute. They're going to say the market shouldn't be limited to an IOS path market.

This didn't come up in the motion to dismiss. They didn't challenge our allegations on that in the motion to dismiss. Clearly, it's going to be part of the dispute in the case. They're going to challenge in summary judgment.

THE COURT: Do you know what they're asking for on 62 and 63?

MS. MILICI: Your Honor, I understand what the requests say. I disagree that this is a narrow request. It's an exceptionally broad request, but in addition, it's not in service of any viable antitrust theory. This is a refusal-to-deal claim, which the Supreme Court said is immune from antitrust scrutiny. It's

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given reasons why the refusal-to-deal duty should not be expanded, and that includes the risk of having central control of courts making decisions about what Apple can and can't say to app developers, how many days it can take to review an app.

A lot of these requests are in service of the refusal-to-deal claim that the Supreme Court has clearly stated is immune from antitrust scrutiny. We cited Judge Boasberg's decision in *U.S. vs. Facebook* explaining why this can't be included in a monopoly brought kind of theory. We have decisions from Judge Coe in the *Freehand* case refusing to consider refusal to deal in a monopoly brought claim. That's how this should be dealt with.

THE COURT: I agree. I appreciate it. Spoiler alert is that I'm not going to make any decisions about refusal-to-deal claims today, but you probably all knew I was going to say that.

But you have, nevertheless, offered to do some amount of discovery that would allow them to probe this issue. What --

Let me ask you, Counsel, what more

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besides what they've offered you think you need.

MR. LARSON: Well, I think on this request, they haven't offered anything, unless I'm mistaken. I think the issue here is that's why we want clarity about --

THE COURT: 62 and 63. Apple has agreed to produce -- okay. So 62 and 63. Yeah, I see. So they don't want to produce 62 and 63 at all.

MR. LARSON: The issue of the categorical -- what they view as a categorical bar on discovery, and they made a few points in the responsive brief that I'd love to address, but if Your Honor --

THE COURT: Let's ask this. Why doesn't everybody sit down for a minute so we can be comfortable.

So 63 talks about all documents, communications, and things referring to or relating to Apple's control of IOS app distribution. I'm inclined to allow some discovery of that. They've given you the policies and things. What more do you want than that?

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MR. LARSON: Well, they say they're going to provide just policies, and I guess if there's Apple documents discussing the fact that they control IOS app distribution, they have complete control over that, I'd be happy to narrow it to documents referring to that if that would be helpful.

MS. MILICI: I'm still not sure what they're looking for. These are incredibly broad requests. They're asking for how Apple views the market for distribution of apps, which is incredibly broad. I'm not sure what the narrowing is, but I do think fundamentally the issue here is that this isn't related to any monopolization of the health watch. This market definition exercise that they want to engage in has nothing to do with the claims, and it's disproportionate under Rule 26.

THE COURT: All right. I'm -- why don't you have a seat.

I'm going to ask you all to meet-and-confer on this more. I'll hear it again. I do agree that the request, as drafted, is incredibly broad. Why don't you come up with a proposal about how you can

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narrow it and an explanation as to why you need it so I can understand better, and I can hear it again if you can't get it worked out. That's 62 and 63.

And then we've got -- Apple has offered some stuff for 76 and 81. That's -- 81 talks about all documents, communications, and things referring or relating to Apple's App Store review guidelines as referenced in the counterclaims.

I don't understand what you're looking for here. Tell me the type of thing. You have the guideline itself. You want it narrowed to responsive documents relating to the relevant technology? What are you thinking? Like, you want to see who else they have not approved?

MR. LARSON: So the reference to the review guideline 1.4.1 refers to the conduct at issue here, that they would use this guideline to exclude competitors, and our narrowing to, essentially, health watches, apps related to health watches, is our attempt to substantially narrow the universe of potential documents to just other companies, like Masimo, with a watch with particular health features and the app

relating to that watch where Apple used that review guideline to exclude them.

THE COURT: Have a seat. It's okay. Did that happen? Do you have documents like that?

10:50AM

MS. MILICI: Your Honor, I do want to address this fundamental misconception of what it means to show harm to competition. It doesn't mean to show harm to another competitor, and these companies are not competitors.

THE COURT: I know. I'm just trying to see the easiest way out of this dispute. For me, the easiest way might be there are no such documents.

10:51AM

MS. MILICI: Your Honor, what that would entail is a search of every app that's ever been reviewed to see whether it meets this definition, and I would say it hasn't even happened as to Masimo. Masimo's apps have been available since December, despite the fact that they continue to include in pleadings to this Court an allegation that they have been refused access. They have not. Their apps were reviewed in a short period of time and approved

10:51AM

and available on the App Store. This didn't even happen as to them.

MR. LARSON: Your Honor, I would disagree with that.

THE COURT: What's 1.4.1?

10:51AM

MS. MILICI: Your Honor, I don't have the guideline in front of me, but I understand it's a guideline about the review process for apps that have a medical component.

THE COURT: You can have a seat. That's fine. Everybody can remain seated.

10:51AM

I'm not going to say that this request is denied at this point. Why don't we go back and see what the burden is to make some production relevant to this.

10:52AM

MS. MILICI: Your Honor --

THE COURT: "All documents and communications and things" is way too broad.

MS. MILICI: I just want to be heard on this for a second because, fundamentally, I think what we're getting at here is this runs into exactly what the Supreme Court said Courts shouldn't be doing, which is to look at each of Apple's deals and say, did Apple take too many days to review that app? Did it ask a question

10:52AM

that the Court would prefer that it not ask? This is a micromanaging of Apple's deals.

THE COURT: To be clear, all we're talking about here today is discovery. That's all we're talking about here today. So Federal Rules of Civil Procedure 26 asks me to look at whether the discovery request is proportional to the needs of the case, and if I can't see how much burden it is. Even if it has very minimal relevance, I can't make that assessment. With the record before me, I can't.

10:53AM

10:53AM

Why don't we go back. I'm telling you on its face this request is broad no matter what the relevance. So let's go back. Nobody is making any decisions about the merits at this point. We're talking about discovery.

10:53AM

All right. 82. I think 82 seems substantially similar to me.

MR. LARSON: Your Honor, may I make -- so Apple -- at issue here is Apple agreed to provide responsive documents, but only if they involve Masimo. The issue is, again, will this just involve Masimo? Because they're going to argue we can't show harm to

10:54AM

competition, are we going to get information where Apple did this to other companies? I disagree with some of the argument that we're hearing about harm. I think harm to competition and harm to Masimo is absolutely relevant, and that's how you show, and I think we need this to show harm to competition.

10:54AM

But that's the issue here, again, whether it should just be limited to Masimo or whether it should also involve other companies with health-related apps.

10:54AM

MS. MILICI: Your Honor, if I can respond to that, *Philadelphia Taxi* case explains what harm to competition means. It means harm to consumers. It's not, as in that case, if there were more taxi operators that were injured, it would change the outcome of the case. The issue here is, did the harm to Masimo cause a harm to consumers, not or other companies that are not even in this market.

10:54AM

10:55AM

MR. LARSON: That's how you show harm to competition, is to show that this is harm -- obviously, just harming Masimo where Masimo can be a competitive force that can harm competition. If Coke excludes Pepsi, that can

10:55AM

harm competition. But especially when we know they already argued it. They're going to argue it again. Masimo you only showed you were harmed. You didn't show any other party was
10:55AM harmed. That's the issue here with the discovery.

THE COURT: Standby. Standby. Everybody take a break.

I'm going to need more briefing on 81 and
10:56AM 82 if you all can't get it worked out.

MR. LARSON: Your Honor, would you like more briefing after we meet and confer?

THE COURT: Yes, please. Meet and confer. I'd like an understanding. I'd like
10:56AM the two parties to have an understanding what's being asked for and why that would be burdensome before I hear it again, though.

All right so that's 81 and 82.

So 80 is a strange one because 80 asks
10:57AM Apple for communications referring or relating to Masimo's strategies. What are we asking for here?

MR. LARSON: Away from the issue of harm to others, now we're focusing specifically
10:57AM on Masimo. And our allegations here -- and we

provided a supplemental 'rog response that lays out our allegations in more detail, but the allegations are that Apple was seeking information about Masimo's FDA strategies, and
10:57AM that while we didn't give Apple the highly confidential communication with the FDA that Apple wanted, Apple had the ability to ask and receive in response to many questions, very targeted and focused questions, information
10:57AM that was not readily available that would not be readily available to other competitors. Individual pieces, you may have been able to go out and find in the public, but we put them all together and tied them up with a bow and
10:58AM provided them to Apple in response to all the specific questions, and they all have to do with our FDA strategies.

And the theory here and our belief is that when you look at the timing of when this
10:58AM occurred, for example, with the safety net, Apple wouldn't approve our app until Apple came out with its own pulse oximetry feature right at the time. With regard to the W1, this is the release of the W1. You have the issues
10:58AM again with Apple, that Apple was doing this to

obtain information about Masimo's FDA strategies because Apple was attempting to do the same.

This request is specifically about Apple
10:58AM discussing Masimo's FDA strategies, which presumably, there wouldn't be many documents about that. If there are, they would be highly relevant. That's what this request is about.

MS. MILICI: Your Honor, I do want to
10:58AM respond to some of this.

The theory that he's saying is that Apple took three months when it was reviewing the safety net app, which by the way, does not connect to a watch. It has nothing to do with
10:59AM watching. During two months of that time, Masimo was not responding to requests for information. But their theory is by asking is this FDA approved -- and this was an app that was supposed to be used by patients in a
10:59AM hospital -- by asking, is this FDA approved, somehow that means that Apple violated the antitrust laws and monopolized the health watch market even though product is not a health watch. The theory here is so divorced from anything on which relief can be granted, that

it cannot be proportional under Rule 26.

THE COURT: I understand your point. Are there really that many documents that -- no idea.

Yeah. So everybody is on the same page,
10:59AM to the extent anybody is arguing merits, I promise you, I will forget. So don't worry about correcting the record on stuff like that because I have a lot going on.

So the fact of the matter was is, Apple
10:59AM asked Masimo about FDA, Apple communication between the parties, and Apple has got some internal documents about Masimo's FDA. Figure out how burdensome that would be, and that's
11:00AM how we'll move forward on that. If it's burdensome, come back.

MS. MILICI: Your Honor, I just want to clarify one thing. You had asked for additional briefing on RFP 80 and 81. Should
11:00AM we also submit additional briefing on RFP 62 and 63 if we're unable to reach agreement?

THE COURT: I'll hear it if it's a question of burden. If it's a question of relevance, I don't want to --

11:00AM MS. MILICI: But if we can't on the

scope --
THE COURT: That's fine.
We've gotten to the time period issue. I can tell you this one I feel comfortable with that. I think Apple's proposal is more than appropriate. So I won't hear argument on that. We're going to go with Apple's proposal about the time period.
MR. LARSON: Can I ask one point of clarification on that? In the briefing --
THE COURT: I was persuaded by their argument.
MR. LARSON: I want to clarify what that time period is. In the briefing, it suggested it may be ten months before filing the complaint, and that seems very narrow.
THE COURT: Apple offered to extend antitrust discovery to January 1, 2020.
MR. LARSON: Thank you, Your Honor.
THE COURT: All right. Then we've got Masimo's additional letter. The first issue, it looked like some stuff had happened since we got the opening letter. I don't really want to hear about it until after you've had a chance to meet-and-confer about whether

or not the supplement is appropriate. Sometimes I want to do that while everyone is here, but I don't think that's going to be productive to do today.
And then we've got this deadline for waiving privilege. Is anybody going to waive privilege? Really?
Let's hear from Apple. You don't have to tell me, but, like, do you think there should be a deadline and what it should be.
MR. SEDDON: Your Honor, we don't think a deadline is necessary, but to the extent there is a deadline, we looked at what the parties are doing in discovery, what they're negotiating on ESI. We would be prepared to give a notice, if we're going to waive privilege, and I'm not forecasting that we are by any means, if we were going to do so, we would be prepared to do so by August 17th. We think there should be a week after that to provide any supplemental disclosure of privilege log or whatever is necessary, so by August 24th.
THE COURT: August 17th.
MR. LARSON: That's what they offered

in their brief. The issue is they say they're going to provide the intent to waive on August 17th, and then, if they don't provide a date, they're going to supplement all discovery including 'rog responses. We're going to get a document and privilege log August 24th. It's very late in process. They've had eight months to decide to waive privilege. We're deciding ESI search terms right now.
THE COURT: Do you think they're going to waive privilege?
MR. LARSON: I don't know if they're going to waive privilege. If they're going to cite counsel, for example -- but I should point out, Your Honor, a new development which is yesterday we received a 'rog response from them late last night that apparently purports to assert inequitable conduct allegations against Masimo. We just received that last night. Apple has had eight months to decide whether to waive privilege. I can't say -- I haven't investigated whether Masimo would want to have any type of waiver, but we don't think 7 days 10 days. What we ask for would be appropriate as to the new allegations from Apple. Before

you rule, I want to make that clear.
THE COURT: Look, we'll set it at August 17th. That's two weeks from now, and then we'll see where the chips fall and move on from there. I don't know what else I can say.
I appreciate counsels' skill and preparation and outstanding letters that I received it's hard in any case, and especially in this case, for the Court to make reasoned decisions based on an incomplete record, which is what I have, and I have to do the best I can with the facts in front of me and, hopefully, that's been apparent to you today, that I'm trying to do the best I can.
You all have got I don't know how many attorneys sitting in this room working on this. When the disputes percolate up to me, I can only do what I can do with the information I have. The train is headed to the station or off the cliff, but the train left the station on this set of litigation. We'll see you all the next time.
MR. LARSON: Your Honor, may I raise one more topic? And we're simply seeking guidance from the Court. We raised this with

Apple. We're not sure if a letter, whatever would be appropriate. We wanted to raise the fact that the Federal Circuit has taken en banc a number of foundational questions as to
11:06AM obviousness for design patents. This is pretty rare. It's been five years since the Federal Circuit has gone en banc. If you look at the questions the Federal Circuit is answering, they're really foundational questions that we
11:06AM think could substantially change the law on obviousness for design patents and questions for the KSR changes.

We raised this with Apple. It's not a situation, for example, where you have two
11:06AM alternative claim constructions. We really have no idea where the law is going to end up on this, so we think whatever reports we serve would have to be completely redone. We proposed the possibility of vacating that
11:06AM deadline and visiting this in January. We just want your guidance.

THE COURT: They dispute -- what's Apple's view? I assume you're disputing that.

MR. LUEHRS: Your Honor, they're
11:06AM trying to stay Apple's design patent claims

because there's a pending issue on appeal.

THE COURT: I understand. The train is going to keep plowing full speed ahead, and we'll deal with it in January when we've got
11:07AM some information from the Federal Circuit and how it shakes out.

Thanks, everybody.

C E R T I F I C A T E

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-1377-MN-JLH, *APPLE INC. Vs. MASIMO CORP, et al.*, heard on August 3, 2023.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 59 typewritten pages, is a true copy of said DISCOVERY CONFERENCE.

SIGNED, OFFICIALLY SEALED, and FILED with the Clerk of the District Court, NEW CASTLE County, Delaware, this 6th day of August, 2023.

_____
Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE, INC.,)
)
Plaintiff,) C.A. No. 22-1377-MN-JLH
) 22-1378-MN-JLH
v.)
)
MASIMO CORPORATION,)
et al.,)
)
Defendant.)

Friday, May 5, 2023
10:00 a.m.

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JENNIFER L. HALL
United States District Court Judge

APPEARANCES:

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BY: BINDU ANN GEORGE PALAPURA, ESQ.

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Counsel for the Defendant

THE COURT: Good morning, counsel. This is Jennifer Hall. We're here on the line for a scheduling conference. This is Apple versus Masimo and Sound United. It's civil action numbers 22-1377 and 22-1378. May I have appearances, please, for plaintiffs?

MR. MOORE: Good morning, Your Honor. It's David Moore.

THE COURT: Good morning, Mr. Moore. Do you have others with you? You may have cut out.

MR. MOORE: Sorry about that. Bindu Palapura is with me. And our co-counsel from Desmarais is on the line as well, John Desmarais, Peter Magic, Jordan Malz and Kerri-Ann Limbeek. We also have counsel from Wilmer Hale on the line, Jennifer Milici and Mark Ford. And I believe we also have in-house counsel from Apple, Natalie Pous and Meaghan Thomas-Kennedy on the line.

THE COURT: Great. Good morning to all of you. Do we have counsel for the defendants on the line?

MR. PHILLIPS: Good morning, Your

Honor. This is Jack Phillips of Phillips, McLaughlin & Hall and with me on the line are Steve Jenson, Brian Horne, Jared Bunker, Ben Katzenellenbogen, Stephen Larson and Adam Powell of the Knobbe Martens firm.

THE COURT: Good morning to all of you. So I thought that I would let you know what my thoughts are and then we'll give everybody a chance to ask questions at the end. I anticipate we may need to get on another call, but let me just tell you what I'm thinking.

I can tell you that we spent a great deal of time looking at the docket and seeing what's pending. We have a good understanding about what claims are at issue in the two cases and what the parties want to do with respect to the schedule. I think we also have a gut understanding about why they want to do what they want to do. So what I'm going to outline for you takes into consideration the parties' pleadings, which we've reviewed, the pending motions to dismiss and strike, the claims and the counterclaims and the defenses. We've looked carefully at the competing proposed

schedules and we looked at all of the arguments made in all of the scheduling related motions to include the pending motions to expedite, to consolidate, to sever and to stay and we've also taken into account that it appears to us that this is -- well, it doesn't just appear to us, it's the case that it's not the only matter between plaintiff and defendants and these cases are part of a larger battle between the parties. You all have many cases against each other related to the products at issue and so any arguments by one side or the other side to the Court about why it would be burdensome to defend against the other side's claims are taken by the Court with a degree of skepticism. And I also think that there's no reason why the parties' claims that they've chosen to bring against each other in Delaware can't move as fast here as they have in other forums as well. I've also taken into account that there is a reason to think that some discovery relevant to this case has already been had. And the parties have suggested that they are both amenable in principle to cross these agreements that would

allow discovery between the cases presently before the Court as well as including some of the discovery that they've had in the Central District of California case and the ITC case.

So having taken the totality of these circumstances under consideration, in my view there's really only one good way to proceed that takes into account both sides' competing interests in having their claims and defenses heard both fairly and expeditiously as well as the Court's and the parties' interests in efficiency. And so here's the broad outline of the plan.

The cases are going to be informally consolidated for pretrial proceedings. There will be one scheduling order that will apply to both cases for pretrial proceeding. Subject to the Court's upcoming ruling on the pending motions to dismiss and strike, every claim and every defense and every counterclaim is going to go forward in discovery at this time. As I mentioned in my oral order yesterday, the Court will take up the motions to dismiss and strike claims and defenses in due

course, but for now everything is going forward in discovery.

The cases and the claims are going to proceed forward with the idea that we will have a case management conference in January of 2024, at which time we will decide which claims and defenses should proceed to trial. And should the Court determine that there are cases that should proceed to trial, the Court is going to be able to get you to trial within a month or two of January 2024. The exact date will be decided at the case management conference in January.

Should the parties desire to file summary judgment motions, briefing on those motions should be complete by the second week in December. If a party wishes to file more than one summary judgment motion, what we're going to do is incorporate a ranking procedure that's consistent with the procedure that Judge Connolly uses. And I know your Delaware counsel will be able to fill you in on that if you're not familiar, but the general idea is that the parties have to make clear the order in which

they want their summary judgment motions heard. So the first motion the party wishes the Court to consider should be designated number one and the second motion number two and so on. And then the Court will review those motions in order. And if the Court decides to deny a motion filed by the parties, barring exceptionable circumstances, the Court will not review any further summary judgment motions by that party.

Alternatively, if the parties want to save some time on the schedule, they can, if both sides agree, forego the opportunity to file summary judgment motions as of right and instead the Court will adopt a procedure under which the parties can file short competing letters requesting leave to file summary judgment. If the parties choose that option, those can be due two weeks before the January 2024 case management conference and we'll take them up at that conference.

And as I said, the plan would be to get you to trial within a month or two of January 2024. That trial may involve a formal

consolidation of certain claims from each of the two actions or it may not. We'll figure that out in January. The parties can argue at that point in time about what should go forward and the Court will need a joint letter no longer than six pages, single-spaced, to be filed at least 10 days before the January 2024 status conference and the letter should indicate how the parties think the case should proceed to trial.

Based on what I said, I imagine that you will all want to go back and meet and confer about discovery limits and dates.

To the extent there is a need to have a markman hearing, I'll need a joint brief for that two weeks before whatever date you want the markman hearing to be and I can accommodate that. I'll be able to get you a ruling on any markman issues at the hearing or very shortly thereafter, but if you don't have a ruling by the time expert reports are due, the parties' experts will need to address both sides' competing claim constructions.

So with respect to the pending

motions we've got in the 1377 case, there's a motion to expedite. That is denied. However, I will say that Apple's request for a trial eight months from the date of the scheduling order comes pretty close to what the Court has just offered on the phone today and my plan is to keep the trial pretty close to eight months from the day we're going to enter the scheduling order. With respect to, again, the 1377 and the 1378 cases, the motion to consolidate cases, that's going to be denied, because we're not going to have formal consolidation at this time. The cases, however, will be informally consolidated for scheduling and discovery and we can re-raise at the case management conference any arguments that the claims should be tried together.

In 1378 we've got a motion to sever certain of the counterclaims in that case. That's denied without prejudice to re-raise at the January 2024 case management conference. And then we have also a motion to stay discovery pending a resolution of a motion to dismiss and that's denied.

I know what you all are probably wondering, which is is Judge Noreika going to go for this and the answer to that is yes. I actually have spoken with her about the pending motions and she and I each independently came up with the plan that I have outlined for you today, which indicates to me that it's a good plan and it's the right way to proceed.

So I don't know where we are with the 26-day disclosures and the initial patent disclosures. At least based on the competing proposed schedules that you all filed a couple weeks ago, it looked to me like we were making some progress, so hopefully those things can be incorporated into whatever you all come up with, but I'd like you all to have a proposed scheduling order with any additional disputes based on the plan that I've outlined set forth in that and then if we need to get back on the phone we can. Hopefully we can get that revised scheduling order within a week.

So does anyone have any questions from plaintiff's side?

MR. DESMARAIS: Hello, Your Honor.

This is John Desmarais for Apple. Your plan sounds like a good one and we have no questions and we appreciate the Court's hard work to come up with the plan. So thank you.

THE COURT: Great. Thanks very much. Any questions from defendants?

MR. HORNE: No, Your Honor. This is Brian Horne for defendants and I echo Mr. Desmarais's sentiments.

THE COURT: Fantastic. Well, let's get crackin' on these claims. So we'll look forward to getting a scheduling from you in a week. Thank you, everybody. Bye bye.

(End at 10:15 a.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Stacy M. Ingram, Certified Court Reporter and Notary Public, do hereby certify that the foregoing record, Pages 1 to 13 inclusive, is a true and accurate transcript of my stenographic notes taken on May 5, 2023, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 5th day of May 2023, at Wilmington.

/s/ Stacy M. Ingram
Stacy M. Ingram, CCR

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